

37 Am. Jur. 2d Fraud and Deceit § 8

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Fraud and Deceit

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I. Overview

A. In General; Definitions and Types of Fraud

§ 8. Actual fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  1, 3 to 4.5, 6, 7

Fraud is broadly classified as either actual or constructive.¹ To constitute positive or actual fraud, there must be such fraud as affects the conscience—that is, there must be an intentional deception.² In other words, active and positive fraud includes cases of the intentional and successful employment of any cunning, deception, or artifice to circumvent, cheat, or deceive another.³ A statute may define “actual fraud” as any of the following acts committed by a party to the contract, or with his or her connivance, with intent to deceive another party thereto or to induce him or her to enter into the contract: (1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he or she believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; or any other act fitted to deceive.⁴

Observation:

Actual fraud cannot be predicated upon acts which a party has a right by law to do, nor upon the nonperformance of acts which by law he or she is not bound to do.⁵

Actual fraud is embraced, generally, under two categories: suggestion of falsehood or false representation,⁶ and suppression of the truth or concealment.⁷ Actual fraud usually involves dishonesty of purpose or intent to deceive⁸ and, as distinguished from constructive fraud, involves the element of deceit practiced upon the party defrauded.⁹ The difference between actual fraud and constructive fraud is primarily the type of conduct that may be treated as fraudulent, such as a failure to disclose material facts within the knowledge of the fiduciary. Furthermore, the reliance element is relaxed in constructive fraud to the

extent that reasonable reliance may be presumed on the misrepresentation or nondisclosure of the fiduciary, absent direct evidence of lack of reliance.¹⁰ Also, constructive fraud differs from actual fraud in that it is based on a confidential relationship rather than a specific misrepresentation.¹¹ Other jurisdictions describe the difference otherwise, stating that the fraud is the same whether it is actual fraud or constructive fraud, the distinction being in the nature of the relief rather than in the character of the fraud.¹²

Observation:

In some jurisdictions an action for fraud may be either legal or equitable in nature.¹³ Also, “innocent” or “constructive” fraud exists only as an equitable doctrine and will not support an action in tort for damages.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Word “actual” has a simple meaning in the context of common-law fraud, denoting any fraud that involves moral turpitude or intentional wrong. [Husky Intern. Electronics, Inc. v. Ritz](#), 136 S. Ct. 1581 (2016).

In the context of common-law fraud, anything that counts as “fraud” and is done with wrongful intent is “actual fraud.” [Husky Intern. Electronics, Inc. v. Ritz](#), 136 S. Ct. 1581 (2016).

[END OF SUPPLEMENT]

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Footnotes

- ¹ [Green v. Lisa Frank, Inc.](#), 221 Ariz. 138, 211 P.3d 16 (Ct. App. Div. 2 2009); [Collier v. Bryant](#), 719 S.E.2d 70 (N.C. Ct. App. 2011); [In re Estate of Kuykendall](#), 206 S.W.3d 766 (Tex. App. Texarkana 2006).
- ² [Loucks v. McCormick](#), 198 Kan. 351, 424 P.2d 555 (1967); [Vela v. Marywood](#), 17 S.W.3d 750 (Tex. App. Austin 2000), review denied with per curiam opinion, 53 S.W.3d 684 (Tex. 2001).
- ³ [Arkansas Val. Compress & Warehouse Co. v. Morgan](#), 217 Ark. 161, 229 S.W.2d 133 (1950); [Vela v. Marywood](#), 17 S.W.3d 750 (Tex. App. Austin 2000), review denied with per curiam opinion, 53 S.W.3d 684 (Tex. 2001).
- ⁴ [Stevens v. Barnes](#), 43 N.D. 483, 175 N.W. 709, 18 A.L.R. 10 (1919); [Gannon, Goulding & Thies v. Hausaman](#), 42 Okla. 41, 140 P. 407 (1914); [Salmonson v. Horswill](#), 39 S.D. 402, 164 N.W. 973 (1917).
- ⁵ § 46.
- ⁶ §§ 59, 62.
- ⁷ §§ 194, 195.
- ⁸ [Archer v. Griffith](#), 390 S.W.2d 735 (Tex. 1964).

- ⁹ Nasaba Corporation v. Harfred Realty Corporation, 287 N.Y. 290, 39 N.E.2d 243 (1942).
- ¹⁰ Estate of Gump, 1 Cal. App. 4th 582, 2 Cal. Rptr. 2d 269 (1st Dist. 1991).
- ¹¹ Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382 (2007).
- ¹² Hanes v. Giambrone, 14 Ohio App. 3d 400, 471 N.E.2d 801 (2d Dist. Montgomery County 1984).
- ¹³ Marsellis-Warner Corp. v. Rabens, 51 F. Supp. 2d 508 (D.N.J. 1999).
- ¹⁴ Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734, 36 U.C.C. Rep. Serv. 450 (1983).

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